

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA

In re

Case No. 03-33108-DHW
Chapter 13

JEFFERY LEON COUCH and
ZSA ZSA BOUVIER COUCH,

Debtors.

MEMORANDUM OPINION

On February 4, 2005, the debtors, Jeffery L. and Zsa Zsa B. Couch, filed an objection to Claim No. 19 filed in their chapter 13 case by Robert McVay (Doc. #66). On February 7, 2005, McVay filed a response to the objection (Doc. #67). An evidentiary hearing to consider the objection was held on March 28, 2005.

JURISDICTION

The court's jurisdiction in this matter stems from 28 U.S.C. §1334. Because an objection to a claim is a core proceeding under 28 U.S.C. §157(b)(2)(B), the court's jurisdiction extends to the entry of a final order or judgment.

FINDINGS OF FACT

Robert McVay is a home builder. McVay built a spec home at 7360 Wimberly Lane in Montgomery, Alabama.

The debtors were interested in purchasing the Wimberly Lane property from McVay, but they were unable to obtain financing for the entire purchase price of the home. They were able, however, to obtain financing for approximately 70% of the purchase price from a third-party lender, and McVay agreed to accept the debtors' \$21,450 promissory note

for the remaining balance of the purchase price.¹ The sales contract on the home was closed on October 25, 2000.

In conjunction with the closing, the debtors and McVay signed an agreement dated October 24, 2000.² In effect, the October 24, 2000 agreement constitutes a punch list of construction defects concerning the Wimberly Lane property. Therein, McVay agreed to complete construction on the property by remedying eleven (11) separately enumerated defects within 30 days following the October 25, 2000 closing.³

McVay did not remedy the defects. McVay contends that during the 30 days following the closing he was either unable to contact the debtors to arrange for a time to make the repairs or that the debtors deliberately denied him access to the property in order to undertake the repair work.⁴ Further, McVay contends that after the 30 days expired, he continued efforts to contact the debtors, but he was unable to gain access to the property to complete the punch list work. Finally, McVay maintains that he told Mr. Couch to have the work done by someone of his choosing and to send him (McVay) the bills. Ms. Couch disputes these contentions.

Further, McVay testified that it would have cost him no more that

¹ The promissory note is Creditor's Exhibit 1 and is dated October 25, 2000. The note is payable over a three-year term and bears interest at the rate of 6% per annum. There is no evidence that the note was secured by a mortgage on the realty or otherwise.

² The October 24, 2000 agreement is Debtors' Exhibit 1.

³ There are actually twelve (12) items listed in Debtors' Exhibit 1; however, one of the items concerning defects in cabinetry and counter tops was crossed off the list and initialed by Ms. Couch. From this the court concludes that those repairs were completed prior to the agreement being signed by the parties on October 24, 2000.

⁴ McVay testified that he went by the debtors' home on at least three occasions and telephoned them many times in an effort to arrange a time to accomplish the repairs but to no avail.

\$845.79 to complete construction and remedy the enumerated defects had he been allowed to do so at the time. This amount is comprised of 79¢ for finishing the front door, \$15 for installing molding on the hardwood floors, \$500 for completing work in the bathrooms, \$10 for pouring a concrete step by the patio door, and \$320 for the purchase and installation of a mailbox and gaslight. He would have incurred no cost for completing the fireplace or for painting various areas because subcontractors were then under contract to him to complete that work.

On July 22, 2004, McVay filed a proof of claim (Claim No. 19) in the amount of \$21,450. The claim was designated as unsecured.

CONCLUSIONS OF LAW

In a claims contest, there is a shifting burden of proof. A properly filed proof of claim constitutes prima facie evidence not only of the validity but of the amount of the claim. Fed. R. Bankr. Proc. 3001(f). Therefore, the objecting party has the burden of producing evidence sufficient to meet the evidentiary weight accorded to the claim under the Rules. However, the ultimate burden of persuasion rests upon the claimant.⁵

Under the doctrine of substantial performance, a party to a contract is not relieved of its duty of counter performance merely because it did not receive perfect tender of performance from the other party to the contract.

⁵ An objection to a claim does not deprive the claim of its presumptive validity unless the objection is supported by substantial evidence. *In re Hemingway Transportation, Inc.*, 993 F.2d 915 (1st Cir. 1993). The objector must offer evidence of equally probative value in order to rebut a prepetition claim, which is presumed to be prima facie valid. *In re Fullmer*, 962 F.2d 1463 (10th Cir. 1992), *abrogated on other grounds*, *Raleigh v. Illinois Department of Revenue*, 530 U.S. 15 (2000). The burden of proof for claims is a shifting one; a claim is prima facie valid if it alleges facts sufficient to suppose a legal liability to the claimant; if the objector then produces evidence to refute at least one of the allegations essential to the claim's legal sufficiency, the burden of going forward shifts back to the claimant to prove the validity of the claim by a preponderance of the evidence. *In re Allegheny International, Inc.*, 954 F.2d 167 (3rd Cir. 1992).

If the tender, although less than perfect, did not deprive the party of the substantial benefit of its bargain, the contract is enforceable and the duty of counter performance is not completely excused. Alabama courts have often applied the doctrine of substantial performance in contract disputes generally and in home construction/sales contracts particularly. *Lowe v. Morrison*, 412 So. 2d 1212 (Ala. 1982); *Gray v. Wood*, 220 Ala. 587 (1930). In the case at bar the debtors received the substantial benefit of the bargain. That is, they received their home which from all evidence was usable and habitable but with minor defects.

Although under the substantial performance doctrine the duty of counter performance is not completely relieved, the non-breaching party is entitled to a reduction in the contract price as a result of the minor breach. The question then is whether to apply the cost of repair or the diminution of value approach in the calculation of damages.

The Alabama courts have addressed the issue of damages in cases involving the doctrine of substantial performance in construction contracts. The Alabama Supreme Court has held that “[t]he proper measure of damages, where correction of defects would amount to economic waste, is the diminution in value of the house as constructed from the value it would have had if it had been constructed in a workmanlike manner.” *Lowe*, 412 So.2d at 1213-14. Where, however, correction of defects would not result in economic waste, the proper measure of damages is the reasonable cost that the homeowner would necessarily incur to make the construction conform to the contract. *Kohn v. Johnson*, 565 So. 2d 165 (Ala. 1990); *Freeman v. Turner*, 374 So.2d 354 (Ala. Civ. App. 1979).

In this case the construction defects complained of could easily be remedied without incurring economic waste. Thus, the measure of damages applicable here is the cost of repair approach.

The only evidence of the cost of the repairs was offered by McVay.⁶ He testified that he could have completed the repairs for \$845.79. The

⁶ Ms. Couch testified that the debtors had not obtained an estimate from a contractor of the cost of the repairs.

claim, then, will be reduced by \$845.79, the cost of repairs.

A consistent order will enter separately sustaining the objection in part and overruling the objection in part and reducing Robert McVay's claim by \$845.79.

Done this 31st day of March, 2005.

/s/ Dwight H. Williams, Jr.
United States Bankruptcy Judge

c: Debtors

Gary A. C. Backus, Attorney for Debtors

Timothy C. Halstrom, Attorney for Creditor

Curtis C. Reding, Trustee